

REMARKS

This is a full and timely response to the outstanding non-final Office Action mailed July 12, 2005. Through this response, claims 8 and 12 are amended and new claims 13 and 14 are added. Claims 1-7 have been canceled without prejudice, waiver or disclaimer in view of the restriction requirement. Claims 8-14 are pending in the present application. In view of the following remarks, reconsideration and allowance of the application, and presently pending claims, are respectfully requested.

I. Restriction

Applicant acknowledges the Examiner's withdrawal from consideration claims 1-7, and thus in the interest of expediting issuance of claims, have canceled claims 1-7 without prejudice, waiver or disclaimer. Applicant reserves the right to present these canceled claims, or variants thereof, in continuing applications to be filed subsequently.

II. Response to Rejection of Claims 8, 9, 11 and 12 under 35 U.S.C. § 102(b)

A. Statement of the Rejection

Claim 8 has been rejected under 35 U.S.C. § 102(b) as allegedly being unpatentable over U.S. Patent No. 3,548,280 to Cockroft, hereinafter referred to as *Cockroft*. Applicant respectfully traverses this rejection. Further, claims 8, 9, 11 and 12 have been rejected under 35 U.S.C. § 102(b) as allegedly being unpatentable over U.S. Patent No. 6,758,590 to Black, hereinafter referred to as *Black*. Applicant respectfully traverses this rejection as well.

B. Cockroft Does Not Disclose, Teach or Suggest All Elements of Claim 8

For a proper rejection of a claim under 35 U.S.C. § 102(b), the cited reference must disclose all elements, features, and steps of the claim. See e.g., *E.I. du Pont de Nemours & Co. v. Phillips Petroleum Co.*, 849 F.2d 1430, 7 U.S.P.Q.2d 1129 (Fed. Cir. 1988) (emphasis added). Therefore, every claimed feature of the claimed invention must be represented in the applied reference to constitute a proper rejection under 35 U.S.C. §

102(b). In the present case, not every feature of the claims is represented in the *Cockroft* reference.

Independent claim 8, as amended, recites:

8. In a particulate-matter-delivery system having a mechanical agitator ***and a meter for monitoring the delivery of particulate matter from the system***, a method comprising the steps of:
activating the mechanical agitator;
deactivating the mechanical agitator;
recursively repeating the ***mechanical agitator*** activating and
deactivating steps; ***and***
deactivating the meter when the mechanical agitator is activated.

(Emphasis Added)

Independent claim 8 is allowable over *Cockroft* for at least the reason that *Cockroft* does not disclose, teach or suggest the features that are highlighted in independent claim 8 above. More specifically, *Cockroft* does not disclose, teach or suggest “either a meter for monitoring the delivery of particulate matter from the system” or “deactivating the meter when the mechanical agitator is activated” as recited in independent claim 8. Thus, Applicant respectfully submits that *Cockroft* does not disclose the emphasized claim features, and respectfully requests that the rejection to independent claim 8 be withdrawn. Applicant notes that the meter is separate from the auger motor that causes the delivery of the particulate matter from the system.

C. *Black Does Not Disclose, Teach or Suggest All Elements of Claim 8*

Independent claim 8 is allowable over *Black* for at least the reason that *Black* does not disclose, teach or suggest the features that are highlighted in independent claim 8 above. Specifically, *Black* relates to “concrete recycling systems.” *Black*, column 1, line 14. Further, *Black* recites in the background portion that a “motor agitates the slurry within the slurry vessel to prevent setting.” *Black*, column 1, lines 27-28. *Black* also recites that the “solids (e.g., aggregate and sand) are separated from the slurry.” *Black*, column 3, lines 11-12. More particularly, *Black* is directed to providing an energy efficient manner for agitating a concrete slurry so it remains unset. *Black*, column 4, lines 61-62. *Black* does not

teach a meter for monitoring the delivery of particulate matter from the system or deactivating the meter when the agitator is activated to address the problem of interference with the meter by operation of the agitator. Applicant respectfully submits, therefore, that *Black* cannot anticipate or render obvious independent claim 8.

D. Claims 9, 11 and 12 are Allowable as a Matter of Law

Applicant respectfully submits that because independent claim 8 is allowable, as argued above, dependent claims 9, 11 and 12 are allowable as a matter of law for at least the reason that they contain all the elements, features and limitations of independent claim 8. *See In re Fine*, 837 F.2d 1071 (Fed. Cir. 1988).

III. Response to Rejection of Claim 10 under 35 U.S.C. § 103(a)

A. Statement of the Rejection

Claim 10 has been rejected under 35 U.S.C. § 103(a) as allegedly being unpatentable over U.S. Patent No. 6,758,590 to Black, hereinafter referred to as *Black*. Applicant respectfully traverses this rejection.

B. Claim 10 is Allowable as a Matter of Law

It is well established at law that, for a proper rejection of a claim under 35 U.S.C. § 103 as being obvious based upon a single reference, the cited reference must disclose, teach or suggest either implicitly or explicitly all elements, features or steps of the claim at issue. *See e.g., In re Dow Chemical*, 5 U.S.P.Q.2d 1529, (Fed. Cir. 1988), and *In re Keller*, 208 U.S.P.Q.2d 871, 881 (C.C.P.A. 1981).

The Office Action admits the numerical time values in claim 10 are not disclosed in *Black*. The Action argues this can be determined by mere optimization. *Black*, however, teaches cycle times to prevent the concrete from setting, a completely different problem than addressed by Applicant. The teachings of *Black* are not directed to Applicant's system or the problem addressed by Applicant's system and, thus, do not render obvious Applicant's cycle times in claim 10.

Moreover, the rejection is in effect an assertion that the cycle time of claim 10 is a design choice. The bare assertion that something is a design choice, however, is insufficient to establish a “suggestion” in the art for the claimed invention. See, e.g., Northern Telecom, Inc. v. Data Point Corp., 15 U.S.P.Q.2d 1321, 1323 (Fed. Cir. 1990). Also, as set forth by the Board of Patent Appeals and Interferences, the statement that something is a design choice is a conclusion and not a reason. Ex parte Garrett, 1986 Pat. App. LEXIS 8 (B. Pat. App. Infr. 1986). Since the Office Action has not provided sufficient motivation for the claimed invention, the Office Action has not established a *prima facie* case of obviousness and their rejection should be withdrawn.

Therefore, Applicant respectfully submits that since *Black* does not disclose, teach or suggest all elements of independent claim 8, as argued above, dependent claim 10 is allowable as a matter of law for at least the reason that it contains all the elements, features and limitations of independent claim 8. *See In re Fine*, 837 F.2d 1071 (Fed. Cir. 1988).

IV. New Claims 13-14

New claims 13 and 14 are dependent upon claim 8. Support for these claims can be found, for example, at page 6 of the specification and in original claims 4 and 5. These claims are believed allowable for the reason that neither of the cited references teaches use of a logic controller or a phase-locked loop to control the activation and deactivation of the agitator or the meter. Further, these claims are believed allowable as being dependent upon an allowable base claim.

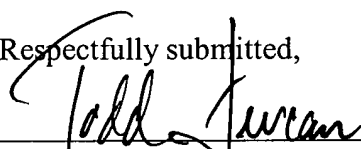
V. Prior Art Made of Record

The prior art made of record has been considered, but is not believed to affect the patentability of the presently pending claims.

CONCLUSION

In light of the foregoing amendments and for at least the reasons set forth above, Applicant respectfully submits that all objections and/or rejections have been traversed, rendered moot, and/or accommodated, and that the now pending claims 8-12, are in condition for allowance. Favorable consideration and allowance of the present application and all pending claims are hereby courteously requested. If, in the opinion of the Examiner, a telephonic conference would expedite the examination of this matter, the Examiner is invited to call the undersigned agent at (770) 933-9500.

Respectfully submitted,



Todd Deveau, Reg. No. 29,526

**THOMAS, KAYDEN,
HORSTEMEYER & RISLEY, L.L.P.**

Suite 1750
100 Galleria Parkway N.W.
Atlanta, Georgia 30339
(770) 933-9500